

General Commission Advisory No. 2009-3: Participation in Union Actions by Public Officials Who are Union Members

I. Purpose and History

The purpose of this General Commission Advisory (GCA) is to publicize the Ethics Commission's interpretation of pertinent provisions of the Code of Ethics as they apply to public officials who, in their private capacities, are public employee union members required, as part of their public duties, to interact with representatives of the umbrella union of which they are members. This GCA represents a shift in interpretation regarding such public officials and employees and the prohibitions placed upon them by the Code of Ethics when faced with taking official action involving the union in which they are a member.

The Code of Ethics defines a "business associate" as "a person joined together with another person to achieve a common financial objective." R.I. Gen. Laws § 36-14-2(3). Additionally, the Code defines a "person" as "an individual or a business entity." R.I. Gen. Laws § 36-14-2(7). Historically, the Ethics Commission has not considered "rank and file" union members to be "business associates" of the umbrella organizations of which they are members;¹ rather, the Commission has considered only those individuals who are union officers or are in some other kind of leadership position in which they can affect the financial objectives of the union to be "business associates" of the organization, such that recusal is required on matters where the organization represents itself before the public official's agency. See R.I. Gen. Laws § 36-14-5(f).²

After conducting research and receiving public comment on this specific issue, the Commission has concluded that the prior analysis applied to this issue is no longer valid.

¹ See, e.g., A.O. 2009-11; A.O. 2008-70; A.O. 2008-15; A.O. 2004-2; A.O. 2003-74; A.O. 2001-39; A.O. 96-92.

² R.I. Gen. Laws § 36-14-5(f) reads:

No business associate of any person subject to this Code of Ethics shall represent him or herself or any other person or act as an expert witness before the state or municipal agency of which the person is a member or by which the person is employed unless:

- (1) He or she shall first advise the state or municipal agency of the nature of his or her business relationship with the said person subject to this Code of Ethics; and
- (2) The said person subject to this Code of Ethics shall recuse him or herself from voting on or otherwise participating in the said agency's consideration and disposition of the matter at issue.

As such, and from this moment forward, the analysis that follows is the one that the Commission will apply in circumstances in which this issue arises in the advisory opinion context.

II. New Analysis

A. Business Association

It is the opinion of the Ethics Commission that dues-paying labor union members are business associates, as that term is defined by R.I. Gen. Laws § 36-14-2(3), of both the local bargaining unit and the umbrella organization to which their membership dues flow. This assertion is based on the fact that a primary objective of any given labor union is to protect the financial employment interests, including the salary, health, and pension benefits, of its members. While labor unions serve many non-financial functions, such as encouraging professional standards, creating professional affiliations, providing educational opportunities, and promoting professional excellence, there is no question that a central function of such unions, indeed, a primary reason for their historical establishment in the first instance, is to protect the financial interests of their membership. This is the underlying purpose for labor unions participating in collective bargaining with public agencies: to secure the best wages and benefits possible for public employees. In this way, local bargaining units and their umbrella statewide organizations are joined with dues paying members to “achieve a common financial objective.” Id.

This is not to say that all membership organizations stand in a business association with their individual members but, rather, only those whose primary commonality of interest hinges on a specific financial nexus. Those “membership” entities with which a person interacts in the ordinary course of business, for purposes that do not entertain a primarily financial or monetary commonality of interest, are not “business associates” of the person who is paying for specific limited services. For example, a person who pays a monthly fee to rent unlimited DVDs does not stand in a business association with the DVD rental company to which they pay monthly “membership” dues.

Additionally, charitable organizations to which a person makes an annual donation and thus is endowed with membership “benefits” that include little more than a monthly newsletter or magazine, such as the National Audubon Society, National Geographic, Zoological societies, the ASPCA, and other like organizations, are not business associates of their dues-paying members. While the purpose of an individual donation is to provide ongoing monetary support to an entity which the individual believes is a worthy cause, a business association is not created by way of the donor’s unilateral monetary contribution.

Furthermore, persons who are members of professional membership associations whose primary purpose is *not* financial in nature and which do not conduct collective bargaining, but, whose focus is on professional affiliation and continuing education do not stand in a business association with those groups merely by way of paying “membership” dues. An example of such a membership association would be a local

subject specific teacher association (for example, a statewide math teachers' association) that sends out a newsletter and has periodic instructional gatherings for members, but is not joined with members for the purpose of directly impacting the members' salary, benefits, and other compensation.

1. Local and Umbrella Organization

Individual labor union members pay dues to the local bargaining unit of which they are a member, a portion of which is retained by that local unit, with some other portion ordinarily flowing up to the statewide and, when applicable, nationwide, umbrella organizations. While each local bargaining unit and statewide organization is structured and functions somewhat differently, it is generally the case that one of the primary missions of any given union is to secure adequate compensation and benefits for its membership; this being the case, we opine that an individual dues-paying member of any given local bargaining unit is a business associate, as that term is defined by R.I. Gen. Laws § 36-14-2(3), of both the local bargaining unit to which the individual pays dues and the statewide entity to which a portion of those dues flow. What this means in practical terms is that when a duly-authorized representative of a local bargaining unit or its statewide affiliate is representing the local or statewide entity before a person subject to the Code who is also a member of that local or the statewide umbrella entity, the person subject to the Code must recuse from taking official action in accordance with R.I. Gen. Laws §§ 36-14-5(f) and 6.

2. Not Individual Members

While it is true that an individual dues-paying member is a business associate of both the local bargaining unit and the statewide entity to which their dues flow, that individual is *not* a business associate of every other dues-paying member of such entities. What this means practically is that, barring any other relationship that would implicate prohibitions found in the Code of Ethics, a person subject to the Code need not recuse, based on R.I. Gen. Laws § 36-14-5(f), from taking official action or remove themselves from situations when other union members appear before them. It is certainly conceivable that a person subject to the Code may be required to recuse when a fellow union member appears before them on another basis, such as if that person is a family member or household member as defined in Commission Regulation 36-14-5004, or if that person is otherwise a "business associate" of the fellow union member under R.I. Gen. Laws § 36-14-5(f), such as, persons in an ongoing attorney-client relationship or otherwise under contract to perform professional services.

EXAMPLE:

A is a member of the Anytown Zoning Board of Review ("Zoning Board"). A is also a police officer in the Metropolis Police Department and a member of Local 101 of the Rhode Island Fraternal Order of Police ("RIFOP"). B is a police officer in Anytown and a member of Local 102 of RIFOP. Although both A and B are business associates of RIFOP, they

are not business associates of one another, as that term is defined in R.I. Gen. Laws § 36-14-2(3), solely because of their common membership in RIFOP.

Similarly, no business association exists between a “rank and file” union member who belongs to one local bargaining unit and an *officer* of a different local bargaining unit of the same umbrella organization. The Commission has previously opined that a person subject to the Code is not *per se* a business associate of all of their business associates’ business associates; prior advisory opinions have opined that this relationship is too remote to invoke the prohibitions found in the Code.³

EXAMPLE:

A is a member of the Anytown Planning Board. A is also a faculty member at Rhode Island University and a member of Local 101 of the Rhode Island Teachers’ Union (“RITU”). As such, A is a business associate of RITU and Local 101. B is a resident of Anytown. B is a faculty member at the Rhode Island Business School and a member and President of Local 102 of RITU. Although both A and B are business associates of RITU, they are not business associates of one another solely because of their common membership in RITU. The fact that B is an officer of Local 102 does not change this analysis.

Finally, no business association exists between members of entirely different labor unions, even if the separate organizations represent individuals within the same occupation, such as teachers, librarians, police officers, firefighters, administrative personnel or municipal employees, or if those persons are officers or otherwise duly-authorized representatives within their separate organizations.

EXAMPLE:

A is a member of the Anytown Town Council. A is also a Department of Public Works (“DPW”) employee in Metropolis and a member of Local 101 of the Rhode Island Municipal Employees Union (“RIMEU”). As such, A is a business associate of RIMEU and Local 101. B is a resident of Anytown. B is a DPW employee in Anytown and a member of Local 101 of the Statewide Municipal Employees Union (“SMEU”). A and B are not business associates, notwithstanding the fact that they are both members of labor unions which represent municipal employees.

³ See, e.g., A.O. 2009-13; A.O. 2003-40; A.O. 2002-76.

B. Contract Negotiations

A person subject to the Code has always been prohibited from negotiating a contract in his or her public capacity with a local bargaining unit in which he or she is a member based on a clear conflict of interest, given that the person would be taking official action that would have a direct financial impact upon that individual's wages and benefits. Essentially, the individual would be negotiating their own pay. Under the Ethics Commission's new interpretation of the term "business associate," a public official who is a union member will now also be prohibited from participating in contract negotiations as part of their public duties when a representative of the umbrella organization of which they are a member appears before that official representing the interests of the organization and its membership.

EXAMPLE:

A is a member of the Anytown School Committee. A is also a teacher in Metropolis and a member of Local 101 of the Rhode Island Teachers' Union ("RITU"). As such, A is a business associate of RITU and RITU Local 101. Anytown is currently conducting contract negotiations with Local 102 of RITU. A must recuse when a statewide representative of RITU, duly -authorized to conduct contract negotiations, represents Local 102 before the School Committee, in accordance with R.I. Gen. Laws § 36-14-5(f).

As previously described, a public official need not recuse from taking official action or remove themselves from carrying out their duties when a duly-authorized representative of a *different* umbrella organization with which they have no membership association appears before them in the course of carrying out their official duties. The official will have no business association with that individual, even if the different union represents individuals in the same profession.

EXAMPLE:

A is a member of the Anytown School Committee. A is also a teacher in Metropolis and a member of Local 101 of the Rhode Island Teachers' Union ("RITU"). As such, A is a business associate of RITU and RITU Local 101. Anytown is currently conducting contract negotiations with Local 101 of the Statewide Teachers' Union ("STU"). A need not recuse when a duly-authorized representative of STU, be it a statewide representative of STU or an officer of STU Local 101 authorized to conduct negotiations, represents STU Local 101 before the School Committee, notwithstanding the fact that A is a member of a different teachers' union, as A is not a business associate of STU.

C. Disciplinary and Other Personnel Matters

A public official who is a business associate of a union by way of his or her membership must also recuse when a duly-authorized representative of that union appears before the official on disciplinary, personnel, and other like matters in accordance with R.I. Gen. Laws § 36-14-5(f).

EXAMPLE:

A is a member of the Anytown Personnel Review Board. A is also a public librarian at Metropolis Public Library and a member of Local 101 of the Rhode Island Municipal Employees' Union ("RIMEU"). B is an administrative assistant at Anytown Town Hall and a member of Local 102 of RIMEU. B has recently been terminated from his position and is appealing that decision to the Personnel Review Board. At the Personnel Review Board hearing on the matter, B will be represented by Representative X, who is an attorney and statewide union representative for RIMEU. A must recuse from this matter, given his business association with RIMEU.

D. Business Association to Entity, not Individual Representative

A public official who is a business associate of a union by way of his or her membership in that union must recuse when a duly-authorized representative of that union appears before the official. However, the official's business association is with the union, not with the individual persons who serve as representatives of the union. Accordingly, when a duly-authorized representative appears on behalf of the union before a public official who is a union member, that public official must recuse pursuant to § 36-14-5(f). Consistent with this analysis, the public official need not recuse when an individual, who is otherwise a duly-authorized representative of the union, appears in their individual, private capacity, *not* on behalf of the union.

EXAMPLE:

A is a member of the Anytown Library Board of Trustees. A is also a municipal employee in Metropolis and a member of Local 101 of the Rhode Island Municipal Employees' Union ("RIMEU"). B is employed as a statewide/regional bargaining representative for RIMEU and represents Local 101 in contract negotiations. B is also a resident of Anytown and a senior citizen. B will be appearing before the Anytown Library Board of Trustees to request that the Board consider allocating funding for library based in-home services to seniors in the Anytown community. A need not recuse when B appears before the Library Board of Trustees on this matter, as B will not be appearing as a duly-authorized representative of RIMEU, but rather, will be appearing as a private citizen of Anytown.

III. Prior Advisory Opinions

Advisory opinions are interpretations of the Rhode Island Code of Ethics. This GCA represents a shift in interpretation of the Code. Persons subject to the Code who have previously received advisory opinions concerning their official actions involving a union of which they are a member will continue to receive safe-harbor from those advisory opinions from the time their individual advisory opinion issued until the issuance of this GCA, provided that they have acted in conformance with the conduct proscribed by the individual advisory opinion. However, be advised that, pursuant to Commission Regulation 36-14-1024, persons subject to the Code may not rely on advisory opinions issued to others. Additionally, persons may not request advisory opinions regarding other people's conduct. Any individual person subject to the Code who has questions concerning their own activity or a potential conflict of interest should contact the Commission's offices at (401) 222-3790 or request an advisory opinion.

IV. Requesting an Advisory Opinions

Pursuant to R.I. Gen. Laws § 36-14-11 and Commission Regulation 1024, public officials and employees may request specific guidance from the Commission about a particular circumstance through the advisory opinion process. Any advisory opinion rendered by the Commission, until amended or revoked by a majority of the Commission, shall be binding on the Commission in any subsequent proceeding concerning the person or entity who requested the opinion and who acted in reliance on it in good faith, unless material facts were omitted or misstated in the request for the opinion. Additionally, advisory opinions are based upon the representations made by, or on behalf of, the person or entity requesting the opinion and are not the result of adversarial or investigative proceedings.

If you are an elected or appointed public official of state or local government, or if you are a public employee of state or local government, you may request advice from the Ethics Commission. If you believe you may face a real or potential conflict of interest, the time to request an advisory opinion is before you take any official action.

A person or entity subject to the Code of Ethics must write a letter to the Commission requesting an advisory opinion. The letter should contain a complete statement of the facts. You may write a paragraph or several pages depending on your particular circumstances. You should include:

- Your name and official position
- Briefly, the name, jurisdiction, and powers of your agency, commission, or office
- The nature of the potential conflict
- A summary of relevant facts
- Any time constraints
- Contact information

The Commission will send you a letter confirming receipt of your request. All hearings involving advisory opinions are open public hearings. Sometime prior to the hearing in which your request will be heard, you will receive a draft recommendation prepared by a staff attorney. Persons requesting advisory opinions are encouraged to attend the public hearing on their request as factual questions may arise that require the requestor's presence. At the hearing, the Commission will consider both the draft recommendation and comments or concerns submitted by the requesting party. The Commissioners may also ask questions to clarify any relevant facts.

The Commission will adopt an advisory opinion by a vote of at least 5 of the 9 members. You will receive a written copy. This opinion and your written request are public records. All advisory opinions are "binding" on the Commission. That means that if you abide by the opinion in good faith, and if you did not misstate or omit material facts in your request for the opinion, you cannot be held in violation of the Code of Ethics in any subsequent proceeding concerning your actions.

For more information, see R.I. Gen. Laws § 36-14-11 and Rhode Island Ethics Commission Regulation 1024, or call the Commission at 222-3790 (V/TT).